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State v. Robinson: Free Speech, Or Itchin' for a Fight?

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NOTE

STATE V. ROBINSON: FREE SPEECH, OR ITCHIN' FOR A FIGHT?

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It is no harm to be an ass,
if one is content to bray and not kick.[2]

I. INTRODUCTION

Assume a pedestrian is crossing the street and sees a marked patrol car at the stoplight. The pedestrian looks at the officer in the car and says "fucking pig." The officer parks his car, approaches the pedestrian and asks if there is something the pedestrian wants to talk about. The pedestrian replies "fuck you asshole." Is the pedestrian exercising a First Amendment right of free speech or are the words wholly unprotected by the U.S. Constitution? In the case of *State v. Robinson*, the Montana Supreme Court faced that exact question with those

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1. Author's Note: This case note contains profane language that may be offensive to sensitive readers. All profanities used herein are verbatim quotes from the referenced opinions and are not additions by the author.

2. MARK TWAIN, PERSONAL RECOLLECTIONS OF JOAN OF ARC 83 (Oxford Univ. Press 1996) (1896).

precise facts and held that the words spoken to the officer were not protected by the First Amendment.[3] The next question is, was the court right?

Any discussion of freedom of speech must begin with the recognition that it is perhaps the most hallowed and essential fundamental right guaranteed by the Constitution. It is the hallmark upon which many other constitutional rights are effectuated,[4] and is an essential element of a free society.[5] Concomitant with the guarantee of free speech is the right of individuals to criticize the government and governmental officials in ways that may appear to the general citizenry to be distasteful or offensive.[6]

The free speech rights guaranteed by the First Amendment to the U.S. Constitution are not, however, absolute. Speech constituting libel, slander, perjury, conspiracy and treason are not afforded protection under the First Amendment.[7] Neither are what the U.S. Supreme Court introduced as "fighting words" over sixty years ago.[8] The fighting words doctrine is based on the premise that there are words which are so lewd, libelous or insulting that simply speaking them will cause injury or a breach of peace. Such words are not protected as communication or opinion under the Constitution because they have little social value and, thus, do not fall within the purview of First Amendment free speech.[9]

Twenty-five years after the U.S. Supreme Court announced the fighting words doctrine, it had occasion to determine the application of fighting words spoken to police officers.[10] The

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3. 2003 MT 364, 319 Mont. 82, 82 P.3d 27.

4. Palko v. Connecticut, 302 U.S. 319, 327 (1937), *overruled on other grounds by* Benton v. Maryland, 395 U.S. 784 (1969) (freedom of speech "is the matrix, the indispensable condition, of nearly every other form of freedom").

5. First Unitarian Church of Los Angeles v. County of Los Angeles, 357 U.S. 513, 530 (1958) (Black, J., concurring) (the freedoms guaranteed by the First Amendment "are absolutely indispensable for the preservation of a free society").

6. Yates v. United States, 354 U.S. 298, 344 (1957), *overruled on other grounds by* Burks v. United States, 437 U.S. 1 (1978) (the First Amendment preserves a free society by "leav[ing] the way wide open for people to favor, discuss, advocate, or incite causes and doctrines however obnoxious and antagonistic such views may be to the rest of us").

7. Aviva O. Wertheimer, *The First Amendment Distinction Between Conduct and Content: A Conceptual Framework For Understanding Fighting Words Jurisprudence*, 63 FORDHAM L. REV. 793, 793-94 (1994).

8. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

9. *Id.* at 572.

10. Houston v. Hill, 482 U.S. 451 (1987).

Court established the principle that the fighting words doctrine should be more narrowly construed when verbal abuse is directed toward law enforcement officers.[11] It reasoned that more deference should be given to First Amendment protections in this context due to the lessened possibility officers will respond violently to fighting words given the training they receive.[12]

Some sixteen years later, the Montana Supreme Court was presented with the *Robinson* case. The court deemed "fucking pig" to be fighting words and, as such, not protected speech under the First Amendment.[13] The court further held it to be irrelevant whether the recipient of the words is an ordinary citizen or a police officer trained to exercise restraint.[14]

This Note argues the Montana Supreme Court failed to correctly apply U.S. Supreme Court precedent in concluding the speech uttered in *Robinson* was fighting words not protected by the First Amendment. Part II outlines the history of the First Amendment and the fighting words doctrine. It also discusses the application of fighting words to law enforcement officers in both federal and state courts. Part III discusses the Montana Supreme Court's decision in *Robinson* and the court's reasoning in concluding the speech constituted fighting words. Part IV analyzes *Robinson* and compares it with the precedent of the U.S. Supreme Court. Part V offers the conclusion that, despite good intentions and possibly the best result for a civil society, the Montana Supreme Court failed to correctly apply binding federal precedent to the *Robinson* case.

II. FREE SPEECH AND THE FIGHTING WORDS EXCEPTION

A. First Amendment Protections

The extent to which speech has been protected under the First Amendment has not remained static. The political and social climate of the time period often determined the extent of First Amendment protections. Much like President Lincoln's

11. *Id.*
12. *Id.* at 462, 471-72.
13. *Robinson*, ¶ 24.
14. *Id.* ¶ 21.

suspension of the writ of habeas corpus during the Civil War, often free speech has been suppressed during times of military actions or national emergencies.[15] The Supreme Court has also yielded to the dictates of the times in determining whether speech is to be protected or repressed.

The origins of free speech in America may, like so many other freedoms protected by the Constitution, be traced to a negative perception of the laws of England where criticism of the government was seen as a crime. Early English courts saw criticism of the government and government officials as seditious libel to be punishable by law, irrespective of whether the allegedly libelous statement may have been true.[16] Colonial American experience was little different. The colonies were often unwelcoming to dissident speech concerning the affairs of government and, as in England, seditious libel was punishable by law.[17]

The First Amendment was ratified in 1791 and provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." What the framers meant by "freedom of speech" and the lengths to which they intended that freedom to be protected is uncertain.[18] Accordingly, it has been the task of the U.S. Supreme Court to determine what exactly freedom of speech means and what the right encompasses.

Shortly after ratification of the First Amendment, the first inroads into limiting free speech had already begun as America faced the possibility of a war with France.[19] In 1798, Congress passed the Alien and Sedition Act prohibiting the publication of

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15. *See, e.g.*, Margaret A. Blanchard, *"Why Can't We Ever Learn?" Cycles of Stability, Stress and Freedom of Expression in United States History*, 7 COMM. L. & POL'Y 347 (2002).

16. Sedition is "[a]n agreement, communication, or other preliminary activity aimed at inciting treason or some lesser commotion against public authority." BLACK'S LAW DICTIONARY 1361 (7th ed. 1999). *See also* Rex v. Tutchin, 90 Eng. Rep. 1133, Holt 424 (Q.B. 1704); 14 HOWELL'S STATE TRIALS 1095, 1128 (1704) ("If men should not be called to account for possessing the people with an ill opinion of the Government, no Government can subsist; for it is very necessary for every Government, that the people should have a good opinion of it.").

17. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 893 (2d ed. 2002).

18. *Id.* at 893-94; *see also* DANIEL A. FARBER, THE FIRST AMENDMENT 9 (2d ed. 2003).

19. FARBER, *supra* note 18, at 57.

"false, scandalous, and malicious writing or writings" with the intention of defaming or exciting the people against the government, the President or Congress.[20] The constitutionality of the Alien and Sedition Act was never brought before the Supreme Court, and it was repealed in 1801. However, it has been suggested that the Court may have upheld the Act based on its application by several Justices sitting on circuit courts.[21] Following repeal of the Alien and Sedition Act, there was little debate concerning freedom of speech until just prior to the Civil War when states began to suppress the speech of abolitionists.[22] The constitutionality of these state efforts was also not addressed by the Supreme Court.[23] In fact, it was not until 1925 that the Court ruled free speech was a fundamental First Amendment "liberty" protected by the due process provisions of the Fourteenth Amendment and, thus, applicable to state action.[24]

After the Civil War, discussion of free speech again quieted until the United States neared another military action, World War I. Congress, concerned with the spreading of opinions in opposition to the war, passed legislation designed to quiet those opinions.[25] The Supreme Court was asked to rule on the constitutionality of those laws from 1919 to 1921 in six major cases.[26] The majority of the Court held the right to free speech was not absolute and deferred to congressional judgment to determine when speech could be considered seditious and

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20. Ch. 74, 1 Stat. 596, Act of July 14, 1798 (expired 1801).

21. FARBER, *supra* note 18, at 57.

22. Christopher P. Keleher, *Double Standards: The Suppression of Abortion Protesters' Free Speech Rights*, 51 DEPAUL L. REV. 825, 828-29 (2002).

23. *Id.* at 829.

24. Gitlow v. New York, 268 U.S. 652, 666 (1925) ("we may and do assume that freedom of speech and of the press . . . are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States"); *see also* U.S. CONST. amend. XIV, § 1 ("[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws").

25. *See* Espionage Act of 1917, ch. 30, 40 Stat. 217, (repealed 1948) (current version at 18 U.S.C. § 793 (2000)); Sedition Act of 1918, ch. 75, 40 Stat. 553 (repealed 1921).

26. *See* Schenck v. United States, 249 U.S. 47 (1919); Debs v. United States, 249 U.S. 211 (1919); Abrams v. United States, 250 U.S. 616 (1919); Schaefer v. United States, 251 U.S. 466 (1920); Pierce v. United States, 252 U.S. 239 (1920); United States *ex rel.* Milwaukee Soc. Democratic Publ'g Co. v. Burleson, 255 U.S. 407 (1921).

detrimental to war efforts.[27] However, a minority of justices became distressed with the direction of the Court and criticized the majority for its restrictive position.[28]

The opinions of the minority justices took hold in the late 1930s as the Court began to adopt a more expansive view of free speech, including cases protecting the rights of Jehovah's Witnesses and labor leaders.[29] This expansive view persisted for the next two decades.[30] Again, however, freedom of speech was challenged during the McCarthy era when Congress passed the Smith Act making it unlawful to "knowingly or willfully advocate, abet, advise or teach the duty, necessity, desirability or propriety of overthrowing or destroying any government in the United States by force or violence, or by assassination of any officer of such government."[31] Challenges to the constitutionality of the Smith Act were brought before the Court in several cases.[32] While the Court did not rule the Smith Act per se unconstitutional, it did place limits on the means by which advocacy proscribed in the Act could be prosecuted.[33]

Again the tide turned in the late 1950s and 1960s as the Court was willing to protect the speech of anti-war protesters and demonstrators.[34] Since that time, the Court generally expanded the right of free speech, finding it to encompass many disparate rights such as the right to burn crosses as well as the right to burn flags.[35]

B. Fighting Words Exception

In the early 1940s, Walter Chaplinsky, a Jehovah's Witness, was distributing literature on the streets of Rochester, New Hampshire and boisterously denouncing all religion as rackets.[36]

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27. JOAN BISKUPIC & ELDER WITT, THE SUPREME COURT & INDIVIDUAL RIGHTS 24 (3d ed. 1997).

28. Keleher, *supra* note 22, at 830.

29. FARBER, *supra* note 18, at 12.

30. *Id.* at 62.

31. Alien Registration (Smith) Act of 1940, Act of June 28, 1940, ch. 439, § 2, 54 Stat. 670 (current version at 18 U.S.C. § 2385 (2000)).

32. *See, e.g.*, Dennis v. United States, 341 U.S. 494 (1951); Yates v. United States, 354 U.S. 298 (1957); Scales v. United States, 367 U.S. 203 (1961).

33. *See Yates*, 354 U.S. 298; *Scales*, 367 U.S. 203.

34. FARBER, *supra* note 18, at 12.

35. *Id.* at 12-13.

36. *Chaplinsky*, 315 U.S. at 569-70.

Rochester citizens complained to the city marshal who told them that Chaplinsky's actions were lawful, but the marshal warned Chaplinsky about the restless crowd.[37] After the disturbance escalated, a traffic officer hustled Chaplinsky toward the police station without informing Chaplinsky he was under arrest.[38] The city marshal was returning to the scene of the disturbance and, upon meeting Chaplinsky and the traffic officer, again warned Chaplinsky about the crowd.[39] Chaplinsky then told the marshal, "'You are a God damned racketeer' and 'a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists.'"[40]

Consequently, Chaplinsky was arrested for violating a Rochester Code provision which prohibited persons from addressing:

> any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation.[41]

Chaplinsky argued that the Rochester Code violated his First Amendment right to free speech.[42] The Supreme Court rejected Chaplinsky's argument and held that the code was sufficiently narrow and limited in scope as to punish specific verbal conduct without impairing communication protected under the First Amendment.[43] In coming to this determination, the Court fashioned the scope of the fighting words exception:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly

37. *Id.* at 570.
38. *Id.*
39. *Id.*
40. *Id.* at 569-70.
41. *Id.* at 569.
42. *Chaplinsky*, 315 U.S. at 571.
43. *Id.* at 573-74.

outweighed by the social interest in order and morality.[44]

The Court's analysis set out two main justifications for the exclusion of fighting words from First Amendment protection: the words themselves are inherently inciteful or capable of causing harm, and they have little or no value as speech.[45] Further, because fighting words are "no essential part of any exposition of ideas, and are of such slight social value as a step to truth," they may be beyond First Amendment protection as they are non-speech.[46] The test for when speech constitutes fighting words outlined by the Court is "what men of common intelligence would understand would be words likely to cause an average addressee to fight."[47]

As noted, the Court was willing to construe the Rochester Code as sufficiently narrow to survive constitutional scrutiny. In addition, the Court has never overturned *Chaplinsky*. Accordingly, one might expect to find similar results in subsequent decisions. However, in the sixty years since the Supreme Court announced the fighting words doctrine it has never upheld a conviction involving fighting words.[48] The Court has overturned convictions based on various factual scenarios including separate cases involving: wearing a jacket stating "Fuck the Draft" in a county courthouse;[49] an antiwar protester blocking a military draft center and telling a police officer "'White son of a bitch, I'll kill you.' 'You son of a bitch, I'll choke you to death,'" and another officer "You son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces";[50] a citizen in a school board meeting, which included approximately forty children, who used the word "motherfucking" to describe "the teachers, the school board, the town and his own country";[51] burning a cross in an African-American family's yard;[52] and telling a crowd being controlled by police "'We'll take the fucking

44. *Id.* at 571-72.

45. *Id.* at 572.

46. *Id.*; Michael J. Mannheimer, *The Fighting Words Doctrine*, 93 COLUM. L. REV. 1527, 1536 (1993).

47. *Chaplinsky*, 315 U.S. at 573.

48. CHEMERINSKY, *supra* note 17, at 968.

49. Cohen v. California, 403 U.S. 15 (1971).

50. Gooding v. Wilson, 405 U.S. 518 (1972).

51. Rosenfeld v. New Jersey, 408 U.S. 901 (1972).

52. R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

street later,' or 'We'll take the fucking street again.'"[53] It is clear the doctrine has expanded far beyond the proclamations in *Chaplinsky* given the wide range of speech the Court has excluded from the fighting words doctrine.

As separate Supreme Court decisions have massaged the fighting words doctrine over time, one can find five elements that must be met in order for speech to be unprotected:

> [F]irst, the words must constitute a direct personal insult; second, the words must be directed to the addressee personally and individually, and may not be a generalized insult addressed to a large group or indiscriminately to the world at large; third, the words must be addressed to the person face-to-face; fourth, the words must be of such a nature as to be likely to provoke the average addressee to an immediate violent response; and finally, the words must be likely to provoke the actual addressee to violence in light of all the circumstances.[54]

Given the narrow range of verbal acts that are prohibited by the fighting words doctrine, some have called for its revision and others have made calls for its abandonment.[55] Nevertheless, the fighting words doctrine tailored under *Chaplinsky* and its progeny remain good law and, more importantly, the law of the land.[56]

C. The Narrower Application to Police Officers

One of the elements the Supreme Court outlined in *Chaplinsky* is that the offensive words must be likely to provoke the "average addressee" to fight.[57] While the *Chaplinsky* Court indicated that offensive is determined in the context of the average addressee, it upheld a statute indicating the addressee to whom the words are spoken should be considered when determining whether the act is forbidden. Specifically, the statute at issue in *Chaplinsky* provided that the words must "have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed."[58] In addition, the

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53. Hess v. Indiana, 414 U.S. 105 (1973).

54. Mannheimer, *supra* note 46, at 1551.

55. *See, e.g.* Wendy B. Reilly, Note, *Fighting the Fighting Words Standard: A Call for its Destruction*, 52 RUTGERS L. REV. 947 (2000); Note, *The Demise of the Chaplinsky Fighting Words Doctrine: An Argument for its Interment*, 106 HARV. L. REV. 1129 (1993).

56. CHEMERINSKY, *supra* note 17, at 968.

57. 315 U.S. at 573.

58. *Id.*

Court subsequently solidified its requirement that the effect on the particular addressee must be considered when determining whether verbal acts constitute fighting words.[59] Thus, the Court suggested the circumstances in which the words are made and to whom the words are addressed is relevant in determining whether verbal acts are fighting words. This has led to much debate and interpretation by the courts as to whether it is the words themselves which can be proscribed or whether a distinction must be made based on the recipient, often called the content versus conduct distinction.[60]

It is within this context that the Supreme Court first suggested application of the fighting words doctrine may require a different analysis when the addressee of the words is a law enforcement official. In *Lewis v. City of New Orleans*, the Court overturned a breach of the peace conviction against an individual alleged to have addressed profanities toward a police officer.[61] The basis of the Court's decision rested on a determination that the code at issue was constitutionally overbroad.[62] In a concurring opinion, however, Justice Powell suggested that the fighting words exception may demand narrower application in cases when the words are addressed to law enforcement officials.[63] He reasoned "a properly trained officer may reasonably be expected to 'exercise a higher degree of restraint' than the average citizen, and thus be less likely to respond belligerently to 'fighting words.'"[64]

Thirteen years later, the Court decided *City of Houston v. Hill* in which it adopted Justice Powell's previous view.[65] After Hill observed two police officers speaking to one of his friends, Hill shouted, "Why don't you pick on somebody your own size?"[66] One of the officers asked, "[A]re you interrupting me in my official capacity as a Houston police officer?"[67] Hill responded,

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59. *Gooding*, 405 U.S. at 524.

60. For a discussion of the content versus conduct distinction, see Wertheimer, *supra* note 7.

61. 415 U.S. 130 (1974).

62. *Id.* at 134.

63. *Id.* at 135 (Powell, J., concurring).

64. *Id.*

65. 482 U.S. 451 (1987).

66. *Id.* at 454.

67. *Id.* (alteration in original).

"Yes, why don't you pick on somebody my size?"[68] Hill was charged under an ordinance for "willfully or intentionally interrupt[ing] a city policeman . . . by verbal challenge during an investigation" but was later acquitted of the charges.[69]

Hill then filed suit in federal court asking, in part, for a declaratory judgment finding the ordinance unconstitutional and requesting a permanent injunction against its enforcement.[70] The district court found that the ordinance, as applied, was not unconstitutional.[71] The Fifth Circuit reversed, holding that the ordinance was facially overbroad.[72]

The Supreme Court agreed, adopting Justice Powell's rationale and holding "in the face of verbal challenges to police action, officers and municipalities must respond with restraint."[73] Further, the Court held that freedom to oppose police action without risking arrest "is one of the principle characteristics by which we distinguish a free nation from a police state," and that "a certain amount of expressive disorder not only is inevitable in a society committed to individual freedom, but must itself be protected if that freedom would survive."[74] The Court was also disturbed by the concept that ordinances such as the one promulgated by the City of Houston allowed the police too much discretion to arrest due to the content of the speech, or "to arrest the speaker rather than to correct the conditions about which he complains."[75]

While the Court had previously reversed convictions based on fighting words addressed to or about law enforcement officials,[76] for the first time the Court recognized the fighting words doctrine may necessitate separate analysis when the words are directed to a police officer. Since *Hill*, the Court has neither reaffirmed nor overturned its analysis concerning application of the fighting words doctrine in the context of law enforcement.

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68. *Id.*
69. *Id.* at 454-55 (alteration in original).
70. *Id.* at 455.
71. *Hill*, 482 U.S. at 455-56.
72. *Id.*
73. *Id.* at 471.
74. *Id.* at 462-63, 472.
75. *Id.* at 466 n.15.
76. *See, e.g., Gooding*, 405 U.S. 518; *Lewis*, 415 U.S. 130; Brown v. Oklahoma, 408 U.S. 914 (1972).

D. Ninth Circuit Interpretation in Poocha

On August 29, 1999, two Yosemite National Park Service rangers attempted to make an arrest in a group of thirty to fifty spectators, including Mr. Poocha.[77] After one of the rangers instructed Poocha to leave, he allegedly responded "fuck you" with his chest stuck out and fists clenched.[78] Poocha was not immediately arrested but, instead, was charged with disorderly conduct the next day for "us[ing] language in a matter [sic] that was likely to incite an immediate breach of the peace while the Ranger was trying to assist other Rangers in attempting to make an arrest" and for disobeying a lawful order.[79] The Federal District Court Judge found Poocha guilty and sentenced him to twelve months probation and ten days in custody.[80] Poocha appealed his conviction to the Ninth Circuit Court of Appeals which overturned it, finding Poocha's statement was speech protected by the First Amendment and that it did not constitute fighting words.[81]

The Ninth Circuit relied on *Hill's* context-oriented reasoning that properly trained police officers are expected to show more restraint and are less likely to react belligerently than the average citizen when confronted with fighting words.[82] The court further reasoned that the fighting words doctrine must be more narrowly applied concerning remarks made to a law enforcement official due to "the constitutional shield [that protects] criticism of official conduct."[83] The fact that Poocha's speech also included "aggressive gestures" was inconsequential to the court and did not affect the ruling that Poocha's statement was protected by the First Amendment.[84]

Finally, the Ninth Circuit suggested that there may be no fighting words exception when the speech targets public officials such as law enforcement. The court stated that application of the fighting words exception is narrowest, "*if indeed it exists at*

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77. United States v. Poocha, 259 F.3d 1077, 1078 (2001).

78. *Id.* at 1079.

79. *Id.* (alteration in original); *see also* 36 C.F.R. § 2.34(a)(2) (2002).

80. *Poocha*, 259 F.3d at 1079.

81. *Id.* at 1082.

82. *Id.* at 1081.

83. *Id.* (alteration in original) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 273 (1964)).

84. *Poocha*, 259 F.3d at 1082.

all, with respect to criminal prosecution for speech directed at public officials."[85] With its ruling, the Ninth Circuit affirmed—and may have expanded upon—the concept that fighting words spoken to the average citizen are generally not fighting words when addressed to police officers.

E. History of the Fighting Words Doctrine in Montana

The Montana Supreme Court had its first substantive exposure to the fighting words doctrine in *City of Whitefish v. O'Shaughnessy*, two years prior to the *Hill* decision.[86] According to Mr. O'Shaughnessy, he was walking down the street with two other men and conversing in a manner louder than normal.[87] A police officer approached O'Shaughnessy and told him to "hold it down."[88] O'Shaughnessy and the officer had a conversation at the end of which O'Shaughnessy said "in a friendly way, 'Give me five, [f.'er].'"[89]

The officer's testimony differed from O'Shaughnessy's. The officer testified that he told O'Shaughnessy to hold it down three to five times and that he warned O'Shaughnessy he could be arrested for disturbing the peace.[90] After being warned, O'Shaughnessy got into the patrol car twice without permission.[91] O'Shaughnessy then wanted to shake hands with the officer.[92] The officer refused and O'Shaughnessy stated, "Well [m.f.], I will holler and yell when and wherever I want if I want to. . . ."[93] The officer arrested O'Shaughnessy for disturbing the peace.[94] A jury found O'Shaughnessy guilty of disturbing the peace and that the language constituted fighting words.[95]

O'Shaughnessy appealed his conviction to the Montana Supreme Court. The court accepted the officer's version of the events for purposes of appeal in that O'Shaughnessy stated

85. *Id.* at 1081 (emphasis added).
86. 216 Mont. 433, 704 P.2d 1021 (1985).
87. *Id.*, 216 Mont. at 435, 704 P.2d at 1022.
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *O'Shaughnessy*, 216 Mont. at 436, 704 P.2d at 1023.
93. *Id.*, 216 Mont. at 436, 704 P.2d at 1023 (alteration in original).
94. *Id.*, 216 Mont. at 435, 704 P.2d at 1022 (alteration in original).
95. *Id.*, 216 Mont. at 436, 704 P.2d at 1023 (alteration in original).

"Well [m.f.], I will holler and yell when and wherever I want if I want to . . ."[96] It found that O'Shaughnessy's speech constituted fighting words as construed by the U.S. Supreme Court in *Chaplinsky*, and that "by definition a threat of violence or threat of violent response was present" due to O'Shaughnessy's words.[97]

Justice Hunt, however, dissented using the same rationale that Justice Powell used in *Lewis*. Justice Hunt reasoned that "[w]hen an officer of the law, as a public servant, approaches a citizen and the latter becomes irate for some reason and unleashes some verbal abuse, no arrest should be made on that basis alone," and that an officer should be able to take an insult with a "grain of salt."[98]

The Montana Supreme Court has had little occasion to further examine the fighting words doctrine since *O'Shaughnessy* was decided.[99] The court has used *Chaplinsky* and the fighting words doctrine to stand for the proposition that not all speech is protected, but has not expended significant attention to the doctrine.[100]

F. Application of Fighting Words Doctrine to Law Enforcement in Other States

It is a general rule that the fighting words doctrine will be applied more narrowly to police officers because they are expected to use more restraint than average citizens.[101] The

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96. *Id.*, 216 Mont. at 437-38, 704 P.2d at 1024; *see also* State v. Meader, 184 Mont. 32, 43, 601 P.2d 386, 392 (1979) (holding on appeal from a criminal jury trial, evidence is viewed most favorable to the State).

97. *O'Shaughnessy*, 216 Mont. at 438-39, 704 P.2d at 1024.

98. *Id.*, 216 Mont. at 444, 704 P.2d at 1028 (Hunt, J., dissenting).

99. The only case where the fighting words doctrine was specifically at issue involved calling a man "a communist government worker, no good son-of-a-bitch, chickenshit, and m------r" and stating "Fight me. Hit me" which the court easily found within the fighting words exception as "words that have a direct tendency to violence." City of Billings v. Batten, 218 Mont. 64, 67, 69, 705 P.2d 1120, 1122, 1124 (1985) (alteration in original).

100. *See, e.g.*, State v. Cooney, 271 Mont. 42, 48, 894 P.2d 303, 307 (1995); State v. Helfrich, 277 Mont. 452, 460, 922 P.2d 1159, 1164 (1996); City of Columbia Falls v. Bennett, 247 Mont. 298, 299-301, 806 P.2d 25, 26-27 (1991) (holding that although the defendant called a citizen a "son of a bitch" and a "bastard" and told a police officer "You're fucking out of line. You've done it this time, you're fucked," the court did not need to apply the fighting words doctrine because fighting words were not part of the charging document or a jury instruction); State v. Lance, 222 Mont. 92, 102, 721 P.2d 1258, 1265 (1986).

101. 12 AM. JUR. 2D *Breach of Peace and Disorderly Conduct* § 12 (1997).

states, however, have taken different interpretations on how narrowly that application will be construed as they have tried to strike a balance between the competing interests of civility and freedom of expression.[102]

In Mississippi, telling a police officer "I'm tired of this God d— police sticking their nose in s— that doesn't even involve them" did not rise to the level of fighting words.[103] In Pennsylvania, stating "F___ you, a_____" to a police officer was also not considered fighting words because it is expected that officers are exposed to emotionally charged events on a daily basis.[104] In Oklahoma, a woman stating, "You're such an ass" and "You mother f—ers, you can't—you're not brave enough to go out and catch murders and robbers. You are a couple of pussies" to two police officers did not involve fighting words due to the increased restraint officers must use.[105] Likewise, swearing at an officer and calling him "a pig" did not constitute fighting words in Illinois.[106]

However, in Maine, calling court security officers "fucking assholes" and attempting to spit on one of them was held to be fighting words.[107] In Florida, calling a police officer a "pussy-assed mother fucker" can be fighting words.[108] In Indiana, telling a police officer to "get the fuck away" and calling him a "lying mother-fucker" constitutes fighting words.[109] In Ohio, there is no distinction between fighting words directed at police officers versus those directed at the general public.[110]

Even within some states there have been different rulings on application of the fighting words doctrine depending on the severity of the conduct involved. For example, in Minnesota, a fourteen year-old girl stating "fuck you pigs" to two police

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102. Robert M. O'Neil, *Rights in Conflict: The First Amendment's Third Century*, 65 LAW & CONTEMP. PROBS. 7, 21 (Spring 2002).

103. Brendle v. City of Houston, 759 So. 2d 1274 (2000) (alteration in original).

104. Pennsylvania v. Hock, 728 A.2d 943 (1999) (alteration in original).

105. Harrington v. City of Tulsa, 763 P.2d 700 (Okla. Crim. App. 1988) (alteration in original).

106. City of Chicago v. Blakemore, 305 N.E.2d 687, 688 (Ill. App. Ct. 1973) ("[o]ffensive language addressed to an officer does not, in, and of itself, create a disturbance of the peace.").

107. State v. York, 732 A.2d 859 (Me. 1999).

108. L.J.M. v. State, 541 So. 2d 1321 (Fla. Dist. Ct. App. 1989).

109. Robinson v. State, 588 N.E.2d 533 (Ind. Ct. App. 1992).

110. City of Akron v. Bozic, No. 20351, 2001 WL 1240137 (Ohio Ct. App. Oct. 17, 2001) (unpublished decision).

officers fifteen to thirty feet away in their squad car was held not to constitute fighting words, but a later case held that calling a police officer "white racist motherf* *ker" and telling that same officer and another that he "wished their mothers would die" did rise to the level of fighting words.[111]

Although *Hill* was decided over fifteen years ago, it is apparent that states are reaching disturbingly different results based on the same general conduct.

III. THE *ROBINSON* CASE

A. Facts and Lower Court Decisions

Malachi Robinson was crossing an intersection in Missoula, Montana around midnight on October 8, 2000, with several other pedestrians.[112] Missoula County Sheriff's Deputy David McGinnis was stopped at the traffic light at the same intersection in a marked patrol car.[113] As Robinson crossed the street, he glared at Officer McGinnis and stated "fucking pig," causing several of the pedestrians to move away.[114] Officer McGinnis parked his patrol car, approached Robinson and told him "he now had my attention and asked him if there was anything he wanted to talk about."[115] Robinson replied, "Fuck off, asshole" and was arrested under section 45-8-101 of the Montana Code Annotated, for disorderly conduct.[116]

In Justice Court, Robinson filed a motion to dismiss, contending that his words were protected as free speech under the United States and Montana Constitutions.[117] The court denied his motion and Robinson pled nolo contendere, reserving his right to appeal the denial.[118] Robinson received a ten-day

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111. *Compare In re* S.L.J., 263 N.W.2d 412 (Minn. 1978), *with* State v. Clay, No. CX-99-343, 1999 WL 711038 (Minn. App. Sept. 14, 1999) (calling officer "white racist motherf* *ker" was not fighting words but wishing death upon mothers was) (alteration in original) (unpublished decision).

112. *Robinson*, ¶ 3.

113. *Id.*

114. *Id.*

115. *Id.* ¶ 4.

116. *Id.*

117. *Id.* ¶ 5.

118. *Robinson*, ¶ 5.

suspended sentence and was fined $100 with $50 suspended.[119]

Robinson petitioned the district court for review of the denial of his motion.[120] On appeal, Robinson did not seek to have the conviction overturned on state constitutional grounds, but only sought review under the U.S. Constitution.[121] The district court also found against Robinson, holding that his "speech had a direct tendency to violence, as it met the definition of fighting words."[122] Robinson appealed to the Montana Supreme Court, again seeking redress solely under the U.S. Constitution.[123]

B. Majority Holding

Justice Leaphart, writing for the majority, began with a tacit attack on the maturity of Robinson's conduct, asking whether the court needed to determine if Robinson should have been tried as a juvenile rather than as an adult.[124] He followed by outlining the definition of fighting words as it had been construed by the court's previous decisions. Specifically, the court defined fighting words as those that "inflict injury or tend to incite an immediate breach of peace" or those that "have a direct tendency to violence."[125] The court cited *Hill*, but only insofar as *Hill* noted that speech is protected "unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."[126] The court did not, however, cite *Hill* for the proposition that a narrower application of the fighting words doctrine applies in instances involving police officers. The court also recognized the ruling established in *Poocha*, but held that pursuant to the Supremacy Clause they were not required to follow its precedent.[127]

The court compared Robinson's situation with that previously encountered in *O'Shaughnessy* in that Robinson used

119. *Id.*
120. *Id.* ¶ 6.
121. *Id.*
122. *Id.*
123. *Id.* ¶ 8.
124. *Robinson*, ¶ 7. Robinson was 20 years old at the time of the incident.
125. *Id.* ¶ 12 (quoting *O'Shaughnessy*, 216 Mont. at 438, 704 P.2d at 1024 and *Batten*, 218 Mont. at 69, 705 P.2d at 1124).
126. *Robinson*, ¶ 12.
127. *Id.* ¶¶ 13-15.

the same expletive as O'Shaughnessy.[128] Based on the similarities, the court found *O'Shaughnessy* to be controlling.[129] It also questioned the logic in *Poocha*, finding that the determination of whether verbal action constitutes fighting words should not depend on the intended recipient, including police officers.[130] The majority reasoned if they were to adopt a rationale that the recipient of the remarks should be considered, "any troglodyte could wander the streets calling young children and old men 'f* * * * * * pigs' because, due to their age or infirmity, they, like the well-trained policeman, will not be able to respond in a violent fashion."[131]

The majority admitted that if the statements had been made at a protest or political rally it may have raised issues of free speech.[132] However, the court was unwilling to hold that goading an officer with Robinson's words "adds to our constitutionally-protected social discourse."[133] While the police are expected to use more restraint than the general public, that same public should not be allowed to "gratuitously test that restraint without fear of being charged with disorderly conduct."[134] The court also reaffirmed the position it took in *O'Shaughnessy* that words such as Robinson's are of such "slight social value" that their benefits are "clearly outweighed by the social interest in order and morality."[135] The court concluded "outside the confines of a sty, 'f* * * * * * pig' qualifies as sufficiently and inherently inflammatory, irrespective of the intended audience."[136]

C. Dissent

Justice Cotter dissented from the opinion and was joined by Chief Justice Gray. Justice Cotter believed *O'Shaughnessy* was distinguishable from the facts in *Robinson* for several reasons. O'Shaughnessy's conduct was more severe than Robinson's in

128. *Id.* ¶ 20.
129. *Id.*
130. *Id.* ¶ 21.
131. *Id.* (alteration in original).
132. *Robinson*, ¶ 22.
133. *Id.*
134. *Id.*
135. *Id.* ¶ 23.
136. *Id.* ¶ 24 (alteration in original).

that O'Shaughnessy was given multiple warnings by the officer to cease his behavior, entered the officer's car on two occasions and threatened further disobedience of the officer's orders "in a direct and personally abusive manner."[137] In contrast, Robinson's comment was from a sidewalk to a police officer sitting in his car.[138] The dissent further questioned the actions of Officer McGinnis in escalating the situation by getting out of his car and challenging Robinson to make further remarks.[139] Had the officer left, the dissent argued, the confrontation would never have occurred.[140]

The dissent also questioned the majority's reasoning that it should make no difference whether the remarks are addressed to a police officer because "'young children and old men' . . . are neither trained nor obligated to keep the peace" while police officers are so trained and obligated.[141] Accordingly, the dissenting judges agreed with the Ninth Circuit's rationale in *Poocha* that trained officers should "be expected to exercise a higher degree of restraint than the average citizen."[142]

V. ANALYSIS

There is no doubt that Robinson's remarks were offensive and inappropriate irrespective of the recipient. There is also no fault with the Montana Supreme Court's attempt to protect law enforcement from verbal assault. The *Robinson* decision, however, is faulty on several fronts. The court relies on factually distinguishable and outdated precedent. It also fails to recognize inherent distinctions between the effect derogatory remarks will have when spoken to the general public versus those same words when spoken to a police officer. Further, the court did not rely on factual differences between *Robinson* and *Hill* which may have led to a legally defensible position. Finally, the court used its decision to inappropriately denigrate the defendant.

The majority's considerable reliance on *O'Shaughnessy* is misplaced. The same expletive may have been used in

137. *Id.* ¶ 29 (Cotter, J., dissenting).
138. *Robinson*, ¶ 29 (Cotter, J., dissenting).
139. *Id.* ¶ 30.
140. *Id.*
141. *Id.* ¶ 31.
142. *Id.* (quoting *Poocha*, 259 F.3d at 1081).

O'Shaughnessy and *Robinson*. The conduct, however, was significantly different. O'Shaughnessy approached the officer by stating "Give me five, [f.'er]," was told to quiet his hollering three to five times, escalated the encounter by getting into the police car twice without being asked to do so, called the officer a "[m.f.]" after the officer refused to shake hands, and told the officer he would "holler and yell when and wherever I want if I want to."[143] By contrast, Robinson called the officer a "fucking pig" from several feet away while the officer was in his car waiting to cross at a streetlight, and only told the officer "Fuck off, asshole" after the officer challenged Robinson about his remark.[144] As the dissent noted in *O'Shaughnessy*, "[w]ith the words spoken in retreat from more than 15 feet away rather than eye-to-eye, there was no reasonable likelihood that they would tend to incite an immediate breach of the peace or to provoke violent reaction by an ordinary, reasonable person," much less a violent reaction by a police officer.[145]

More importantly, *O'Shaughnessy* was decided two years before the U.S. Supreme Court announced in *Hill* that the fighting words doctrine requires separate application when those words are spoken to a police officer. As noted, the majority did cite to *Hill*. It did not, however, follow *Hill's* stated mandate. Nor did it follow its reasoning that freedom to verbally oppose police action without risking arrest "is one of the principal characteristics by which we distinguish a free nation from a police state."[146] Accordingly, the majority ignored the principle holding in *Hill* and chose to use outdated analysis.

There is no fault in the court's conclusion that it is not required to follow the precedent established in *Poocha*. Federal courts have generally held that their state counterparts are under no obligation to follow precedent established in federal district and circuit courts.[147] However, those same courts are

143. *O'Shaughnessy*, 216 Mont. at 435-36, 704 P.2d at 1022-23 (alterations in original).

144. *Robinson*, ¶ 3-4. Justice Cotter also dissented on the basis that O'Shaughnessy was convicted by a jury where the evidence is reviewed on appeal in a manner most favorable to the state. Robinson, however, was not convicted by a jury in which case the legal analysis is conducted de novo. *Id.* ¶ 28 (Cotter, J., dissenting).

145. *O'Shaughnessy*, 216 Mont. at 446, 704 P.2d at 1029 (Hunt, J., dissenting) (quoting *S.L.J.*, 263 N.W.2d at 420).

146. *Hill*, 482 U.S. at 463.

147. *See generally* Freeman v. Lane, 962 F.2d 1252, 1258 (7th Cir. 1992); Bromley v. Crisp, 561 F.2d 1351, 1354 (10th Cir. 1977); Owsley v. Peyton, 352 F.2d 804, 805 (4th Cir. 1965).

cognizant that the lack of recognition state courts may utilize for federal court precedent only applies until the U.S. Supreme Court makes a binding decision on the issue in question.[148] It is axiomatic that the highest court of a state must give deference to decisions of the U.S. Supreme Court on federal Constitutional issues and follow its mandates.[149]

With respect to the facts at issue in *Robinson*, the U.S. Supreme Court has so spoken. It declared that a narrower interpretation of the fighting words doctrine applies when the words are spoken to a police officer.[150] Although other states have rendered decisions conflicting with this mandate,[151] it does not excuse the Montana Supreme Court's failure to follow U.S. Supreme Court precedent on issues of U.S. Constitutional law. Failure to recognize and follow the mandates of the Supreme Court weakens its decisions as well as the court's respect within the judiciary and the bar.[152] It also undermines the integrity of the judicial hierarchy.[153] The decision in *Robinson* may contribute to just such a result. Moreover, even if the U.S. Supreme Court had not spoken on the issue, the disparity of rulings in *Poocha* and *Robinson* will lead to inconsistent results depending on whether a case comes before a federal court in the Ninth Circuit or a Montana state court, and depending on whether the words are spoken to a federal officer or a Montana state officer.

Another failure of the *Robinson* majority was to improperly reason that there is no practical distinction between fighting words spoken to a police officer and those spoken to the general public. By its ruling, the court did not explicitly do away with any distinction between the content of fighting words and the conduct, or context, with which they are related. However, by concluding that "f* * * * * * pig" can be construed as fighting

148. *Bromley*, 561 F.2d at 1354; *Owsley*, 352 F.2d at 805.

149. Pennekamp v. Florida, 328 U.S. 331, 335 (1946) ("[t]he Constitution has imposed upon this Court final authority to determine the meaning and application of those words of that instrument which require interpretation to resolve judicial issues"); Elmendorf v. Taylor, 23 U.S. (10 Wheat.) 152, 160 (1825) ("the construction given by this Court to the constitution and laws of the United States is received by all as the true construction"); *see also* 20 AM. JUR. 2D *Courts* § 170 (1995).

150. *Hill*, 482 U.S. at 462, 471.

151. *See supra* notes 106-110 and accompanying text.

152. Thomas J. Long, *Deciding Whether Conflicts With Supreme Court Precedent Warrant Certiorari*, 59 N.Y.U. L. REV. 1104, 1106 (1984).

153. *Id.*

words "irrespective of the intended audience," the court suggested such distinctions are less important than the U.S. Supreme Court previously found in *Hill*.[154] At minimum, the holding established that any content versus conduct distinction is irrelevant in Montana as it relates to police officers.

The *Robinson* majority conclude that if they were to decide otherwise, anyone could call "young children and old men 'f* * * * * * * pigs'" because the recipient has no means to respond violently.[155] The term "pigs" has a specific derogatory meaning with respect to police officers. Calling an average person a "fucking pig" denotes more about their dietary habits than their repressive tendencies. Addressing the same language to a police officer questions whether the recipient uses their authority in a restrictive and arbitrary fashion. In addition, and as noted by the dissent, the young and the infirm are not trained to face derogatory language.[156] Police officers are so trained and are expected to be more restrained in the face of derogatory remarks. Nor do the young and the infirm generally encounter potentially volatile and antagonistic behavior on a daily basis. It can be argued that the restraint mentioned by the dissent is more appropriately the restraint not to respond with violence but instead to use other means such as arrest. However, it is the potential for violence that is at the heart of the fighting words exception. In *Chaplinsky*, the U.S. Supreme Court established that fighting words are those causing "an average addressee to fight."[157] In *Hill*, the Court held that police officers are not average addressees but, instead, due to their training and the special circumstances of their duties are less likely to fight than the average addressee when faced with vulgar or derogatory remarks.[158] Inherent in the concept of fighting words is the notion that the recipient of the words will respond with violence. Accordingly, if there is no likelihood of a fight in response to a verbal assault, by definition there are no fighting words. With no likelihood of a fight due to the special training and experience of a police officer, *Hill* established that the fighting words exception requires a separate analysis when

154. *Robinson*, ¶ 24 (alteration in original).
155. *Id.* ¶ 21 (alteration in original).
156. *Id.* ¶ 31 (Cotter, J., dissenting).
157. *Chaplinsky*, 315 U.S. at 573.
158. *Hill*, 482 U.S. at 462.

offensive language is directed to them.

Hill notwithstanding, the U.S. Supreme Court has rejected reasoning comporting with the notion that insulting language should be fighting words irrespective of the recipient. In *Gooding*, the State of Georgia argued that its breach of the peace statute was not overly broad because it applied the fighting words concept to language tending to provoke violent resentment in the recipient.[159] The Supreme Court, finding otherwise, cited to Georgia appellate court decisions holding that a breach of the peace could occur if fighting words are spoken on the opposite side of a raging stream, to someone locked in a jail cell, or to those who "on account of circumstances or obligations imposed by office" may not be able to respond with violence at the time.[160] The Court found this notion too broad as there was "no likelihood that the person addressed would make an immediate violent response."[161] Accordingly, although the language may be inappropriate, the Montana Supreme Court's reasoning concerning application of the fighting words exception to insulting language spoken toward "young children and old men" is as misplaced as was the reasoning of the Georgia appellate courts.

The Montana Supreme Court also missed a potential opportunity to ground its result on a legally rational basis. In *Hill*, the U.S. Supreme Court based its result, in part, on the fundamental freedom to "challenge police *action* without thereby risking arrest" and that officers must respond with restraint "in the face of verbal challenges to police *action*."[162] The defendant in *Hill* was challenging what he perceived to be police efforts to detain one of his friends.[163] By contrast, in *Robinson* there is no indication that the defendant was challenging any action by the police.[164] Therefore, there was no political or free speech motive to the words since Robinson was simply offering gratuitous profane insults to the officer and not challenging any action the officer was taking. The court did note Robinson's words were

159. *Gooding*, 405 U.S. at 525.

160. *Id.* at 525-26 (citing Elmore v. State, 83 S.E. 799 (Ga. Ct. App. 1914)).

161. *Id.* at 528.

162. *Hill*, 482 U.S. at 462, 471 (emphasis added).

163. *Id.* at 453-54.

164. In 2002, Robinson received a 36 month sentence for possession of drugs and drug paraphernalia. Judgment, State v. Robinson, No. DC-99-13833 (Missoula Dist. Ct. filed Sept. 3, 2002). However, his previous conviction was not raised as in issue in the record.

not uttered at a protest or political rally and that they did not add to constitutionally protected discourse, but it did not distinguish the fact that Robinson was not protesting a specific police act.[165] That said, any decision by the court to do so may not have changed the inconsistency of its result with that of *Hill*. However, at the very least the court's decision would have had some basis with which to distinguish the facts of *Robinson* with those of *Hill*.

Finally, the majority's disparaging remarks and personal attack against Mr. Robinson are troubling. The opinion questioned Robinson's maturity by asking whether he should have been tried as a juvenile, indicated that Robinson "stretch[ed] his vocabulary to its fullest" extent when he said "Fuck off, asshole," tacitly called Robinson a "troglodyte," and indicated that Robinson's words had no place "outside the confines of a sty."[166] The court is well within its discretion in using judicial ink to suggest that certain behavior is inappropriate. The extent to which the majority demeaned Robinson does not, however, reflect positively on the court. In *Estate of Miles v. Miles*, the court noted that rules of professional conduct prohibit antagonistic behavior by attorneys and that the court will "not tolerate derogatory comments or personal attacks upon other attorneys, their clients, or the judiciary."[167] The court went on to chastise one of the attorneys in the case for his personal attacks and told him that "[h]e must understand that professionalism, civility and zealous advocacy are not mutually exclusive concepts."[168] While there are no binding rules in Montana governing the conduct of judges, the majority would do well to heed its own words. In addition, the statute under which Robinson was convicted makes it a misdemeanor for disturbing the peace by using abusive language.[169] The language used by the majority to condemn Robinson may well fit within that prohibition. Thus, the court may want to consider the way it uses judicial ink to criticize in the future lest it be impaled on its own sword.

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165. *Robinson*, ¶ 22.
166. *Id.* ¶¶ 4, 7, 21, 24.
167. 2000 MT 41, ¶ 61, 298 Mont. 312, ¶ 16, 994 P.2d 1139, ¶ 16.
168. *Id.*
169. MONT. CODE ANN. § 45-8-101(1)(c) (2003).

VI. CONCLUSION

The Montana Supreme Court's decision in *Robinson* fails in several respects. It relies on outdated and inapplicable Montana precedent. It fails to recognize the practical distinction between fighting words spoken to a police officer and fighting words spoken to an average addressee. It used its position to disparage a party to the case. Most importantly, it failed to follow the mandates of the U.S. Supreme Court. In *Hill*, the Supreme Court ruled that because a police officer is not likely to fight in response to verbal provocation, by definition there can be no fighting words. Unless and until the Supreme Court overturns *Hill*, it is the duty of lower courts to follow the Court's ruling on issues of U.S. Constitutional law and not rely on outdated precedent.

We are all free to question whether the rationale of *Hill* is appropriate. Indeed, there are few among us who would commend Robinson's vulgar remarks. There are also few among us who would blame a police officer for being offended by them and arresting the offender, or blame a prosecutor for advocating the necessity of prosecution. Incivility toward our fellow citizens denigrates society as a whole. Incivility toward the police and challenges to their authority causes a loss of respect for laws and reduces police effectiveness. In extreme circumstances, incivility may indeed lead to a breach of the peace.

However, limitations on free speech under the U.S. Constitution are not for the general public to decide, nor is it the place of the Montana Supreme Court to do so when the U.S. Supreme Court has spoken. When the Supreme Court rules upon areas within its province the lower courts must follow. As the ultimate arbiter of First Amendment free speech, the Supreme Court unequivocally held that the fighting words doctrine requires a narrower interpretation when the words are spoken to a police officer. By holding that there is no distinction between words spoken to a member of the general public and a police officer, the Montana Supreme Court has broken from this mandate. Just as incivility toward police officers causes a lack of respect for their authority, failing to follow the edicts of the U.S. Supreme Court lessens the Court's ability to determine the supreme law of the land, and the Montana Supreme Court was misguided in doing so.